92-1247

NO. _____

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARY ANN VOGEL,

ON BEHALF OF THE ESTATE OF PHILLIP H. GOTTFRIED, DECEASED,

Petitioner,

v.

ADMINISTRATOR OF THE ESTATE OF PHILLIP H. GOTTFRIED, DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, WYANDOT COUNTY, OHIO

MARY ANN VOGEL, PETITIONER
IN PROPRIA PERSONA
107 HOLIDAY PLACE
NEWARK, DELAWARE 19702-2314
TELEPHONE (302) 454-1373

QUESTION PRESENTED FOR REVIEW

A STATE DENIES A PERSON (ESTATE) DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT PERMITS A FIDUCIARY TO CHARGE AND RECEIVE EXECUTOR'S FEES AND ATTORNEY FEES.

PARTIES TO PROCEEDING

PETITIONER, MARY ANN VOGEL, SISTER OF DECEDENT PHILLIP H. GOTTFRIED AND BENEFICIARY OF THE ESTATE.

RESPONDENT, MARK ELLIS, ADMINISTRATOR AND ATTORNEY FOR THE ESTATE OF PHILLIP H. GOTTFRIED, DECEASED.

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THE TRIAL COURT AND THE WYANDOT COUNTY OHIO COURT OF APPEALS ERRED IN PERMITTING AN INDIVIDUAL TO RECEIVE BOTH EXECUTOR FEES AND ATTORNEY FEES FROM THE DECEDENT'S ESTATE.

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APPENDIX:

In the Matter of the Estate of Phillip H. Gottfried, Deceased August 5, 1991, Wyandot County Probate Court, Case No. 85-071, unrptd., Opinion and Judgment Entry..... A (i)

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TABLE OF AUTHORITIES

ALLIED STORES OF OHIO VS. BOWERS,

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FOX VS. STANDARD OIL COMPANY OF NEW JERSEY, 294 U.S.87 (1935)..... 6

CONSTITUTIONAL PROVISIONS:

Amendment V United States Constitution..... 2

Amendment XIV United States Constitution..... 3

Petitioner, Mary Ann Vogel respectfully prays that a Writ of Certiorari issue to review the judgment of the Wyandot County, Ohio Court of Appeals entered May 28, 1992, Case No. 16-91-26 affirming the decision of the Wyandot County Probate Court In the Matter of the Estate of Phillip H. Gottfried, Deceased, Case No. 85-071 decided August 5, 1991, and the Judgment of the Ohio Supreme Court entered October 21, 1992, overruling Petitioner's Motion for Leave to Appeal and claimed appeal as of right.

OPINIONS BELOW

The Opinion in the Wyandot County Court of Appeals denying Petitioner's objection to the payment of double compensation of an individual serving as Fiduciary and Attorney is unreported.

The Opinion of the Wyandot County Probate Court is attached in Appendix as a A (i).

The Opinion of the Wyandot County Court of Appeals affirming the judgment of the Wyandot County Probate Court is unreported by this and attached in the Appendix as A (ii).

The Supreme Court of Ohio did not render an Opinion. It's Entry overruling Petitioner's Motion For Leave to Appeal and claimed Appeal as of right is attached in the Appendix as A (iii).

JURISDICTIONAL GROUNDS FOR REVIEW

On October 21, 1992, the Ohio Supreme Court overruled Petitioner's Motion to Appeal and Claimed Appeal As of Right and dismissed her Appeal. Petitioner now timely files this Petitioner within ninety (90) days of that date.

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. Section 1247 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution which provides:

AMENDMENT V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner filed objections with the Probate Court for permitting the Executor, Attorney Mark Ellis to receive compensation for both his services as Executor and Attorney for the Estate. Ohio Revised Code Section 2113.35 provides for compensation of Executors and Administrators of estates, and Ohio Revised Code Section 2113.36 provides reasonable compensation for attorneys representing estates. However neither statute clearly sets forth that both the Executor and the Attorney should be separate people nor is there any discussion or provision for compensation when the Executor and Attorney are the same person.

The Petitioner, Mary Ann Vogel is a layperson, not well-versed in the law, however; she invokes the Court's justice and equity powers and asserts the common sense argument that no person in whom Fiduciary duties are vested should be allowed to profit from such position by employing himself or herself to provide other services. The Courts of Ohio by permitting the Executor to engage in such conduct have condoned a conflict of interest and have in essence allowed the Executor to double dip (i.e. be paid twice for performing the same services). Additionally there are no checks and balances for an Executor serving as an Attorney to expeditiously handle an estate and to insure that there is no overreaching by the Attorney and/or the Executor.

The Petitioner represents that Ohio's position in allowing an Executor to receive both compensation as Fiduciary and as an Attorney contrary to the Rules of the majority of other State Courts and as such the Petioner represents that the Estate of Phillip H. Gottfried, deceased has been denied equal protection and due process of the law by the State of Ohio permitting the unfair and unjustified taking of property from the Estate of Phillip H. Gottfried.

HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

Petitioner filed her Appeal in the Wyandot County Court of Appeals which decision is attached in the Appendix. The Court of Appeals summarily dismissed the argument against dual compensation for a Fiduciary, also serving as an Attorney. The Ohio Supreme Court denied Petitioner's Motion For Review of the Court of Appeals decision.

REASONS FOR GRANTING THE WRIT

The Petitioner represents that the Fifth Amendment to the United States Constitution provides in relevant part that:

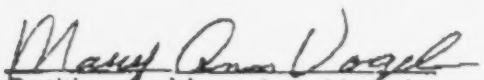
"No person shall be... deprived of life, liberty, or property without due process of law..."

In brief, Petitioner represents that the State of Ohio has denied the Estate of Phillip H. Gottfried due process and equal protection by permitting one individual to receive dual compensation as both Attorney and Fiduciary of the Estate. The Petitioner directs the Court's attention to the cases of Allied Stores of Ohio vs. Bowers, 358 U.S. 522 (1959), and Fox vs. Standard Oil Company of New Jersey, 294 U.S. 87 (1935) for the proposition that in order for the Ohio's statues as interpreted to be constitutionally upheld they must 1) be within the scope of legislative power, 2) They must reasonably relate to the services provided and 3) all persons should be treated fairly and equally. The Petitioner respectfully represents that Ohio's scheme in allowing one individual to serve as both Attorney and Fiduciary violates the Constitutional standards as set forth in above and respectfully represents that this Court must overturn the Ohio statutes as applied. It is patently unfair to allow the State to permit the unfair taking of property and the Estate of Phillip Gottfried is denied equal protection and due process by the dual compensation of one individual acting as both a Fiduciary and Attorney in the Estate.

CONCLUSION

In conclusion, for the above stated reasons a Writ of Certiorari should issue to review the judgment of the Wyandot County Court of Appeals.

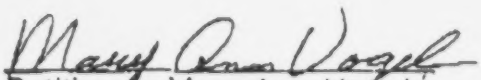
Respectfully submitted:



Petitioner, Mary Ann Vogel
In Propria Persona by Mary Ann Vogel
107 Holiday Place,
Newark, Delaware 19702-2314
Telephone: (302) 454-1373

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari and Appendix was served upon Respondent, Mark Ellis, Administrator of the Estate of Phillip H. Gottfried, Deceased by regular U.S. Mail by postage prepaid at his address of P.O. Box 6, 110 South Sandusky Avenue, Upper Sandusky, Ohio, 43351.



Petitioner, Mary Ann Vogel

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARY ANN VOGEL,

ON BEHALF OF THE ESTATE OF PHILLIP H. GOTTFRIED, DECEASED,

Petitioner,

v.

ADMINISTRATOR OF THE ESTATE OF PHILLIP H. GOTTFRIED,

Respondent.

APPENDIX

90-029 SCB 93

IN THE PROBATE COURT OF WYANDOT COUNTY, OHIO

In the matter of

THE ESTATE OF PHILLIP H. GOTTFRIED, DECEASED	:	Case No. 85-071
	:	Docket 17, Page 205
	:	JUDGMENT ENTRY APPROVING THIRD AND FINAL ACCOUNT

This cause came on before the Court on the 26th day of July, 1991, for the purpose of a hearing on the Exceptions to the Third and Final Account, filed with the Court on July 5, 1991, by Mary A. Vogel personally appeared, as did Mark J. Ellis, Successor Administrator and Attorney for the Estate of Phillip H. Gottfried, deceased.

Based upon the testimony and evidence, this Court finds that the majority of the Exceptions raised by Mary A. Vogel have previously been raised in relationship to the First Partial Account, Second Partial Account, the previous award of partial attorney's fees, and/or various other actions which have previously been

litigated before this Court. Therefore, any and all Exceptions previously raised and litigaged before this Court are res judicata and should be denied. The Court further finds that the only new matter raised in the Exceptions by Mary A. Vogel are those pertaining to the attorneys fees to be allowed to Mark J. Ellis and relative to the Third and Final Account.

Based upon the testimony and evidence presented, this Court finds that Attorney Mark J. Ellis has filed a sufficiently itemized statement, incorporated with his Third and Final Account, setting forth the specific services rendered, the dates such services were rendered, and the time involved in rendering such services. The Court further finds that the services claimed by Attorney Mark J. Ellis were directly related to the administration of the estate and/or litigation or administrative proceedings wherein the Estate or the Successor Administrator were named parties. The Court further finds that the services rendered by Movant were performed in the furtherance of the estate

administration and to the benefit of the estate; that the services were necessary; and that the hourly rate charged by Movant was reasonable, said rate having previously been determined by Journal Entry filed February 13, 1991. The Court further finds that Attorney Mark J. Ellis is entitled to receive and should receive the attorneys fees set forth in the Third and Final Account in the sum of Nine Hundred Eighty Seven Dollars Seventy Cents ($987.70).

The Court further notes, in passing, that subsequent to the hearing on July 26, 1991, Mary A. Vogel filed with this Court a letter ot Attorney Mark J. Ellis dated July 31, 1991. In that letter and for the first time Mary A. Vogel objected to Mark J. Ellis receiving compensation in the form of attorney's fees and administrator's fees. Although this objection is untimely made and should be rejected for that reason alone, the Court specifically finds that it affirmed the payment of the fiduciary's fees in its approval of the First Partial Account, filed in this case on December 21, 1990. The

Court further finds that the Court was fully aware that Mark J. Ellis had received such fiduciary's compensation when the Court approved the application for partial attorneys fees to Mark J. Ellis, which fees were approved following a record hearing, by Journal Entry filed February 13, 1991. The Court further notes that Mary A. Vogel failed to object to the dual compensation at the record hearings held January 31, 1991, February 6, 1991, and July 26, 1991. Irrespective of this apparent waiver by Mary A. Vogel, this Court specifically finds that the Court's allowance of dual compensation to Mark J. Ellis in his capacities as successor administrator and the attorney for the estate was warranted under the circumstances and conditions of this estate and are again specifically approved by the Court.

The Court therefore further finds that the fiduciary has administered the estate lawfully and in accordance with his powers and the applicable sections of law; that the estate has been fully administered and the assets have been distributed in accordance with the laws

governing distribution; and that the events have occurred after which the Court may approve and settle a final account.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Exceptions to the Third and Final Account filed by Mary A. Vogel are hereby OVER-RULED and REJECTED; and that Third and Final Fiduciary's Account in this estate is APPROVED as filed; and that Mark J. Ellis, as Successor Administrator of the Estate of Phillip H. Gottfried, deceased, is hereby discharged from his trust. Bond previously given in this Estate is hereby released and discharged.

THIS IS A FINAL APPEALABLE ORDER.

John G. Hunter /s/
JOHN G. HUNTER, JUDGE

File-stamped copies of entry mailed to M. Vogel, K. Thiel this 5th day of August, 1991.

Carrol Pfufter /s/
Chief Deputy

COURT OF APPEALS
WYANDOT COUNTY, OHIO
THIRD APPELLATE DISTRICT

IN THE MATTER OF THE

ESTATE OF PHILLIP H. CASE NO: 16-91-26

GOTTFRIED, DECEASED

(MARY ANN VOGEL, APPELLANT)

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court, Probate Division

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: May 28, 1992.

==========

ATTORNEYS:

MARY ANN VOGEL
In Propria Persona
107 Holiday Place
Newark, Delaware 19702-1373
Appellant.

MR. MARK J. ELLIS
Attorney at Law
110 South Sandusky Avenue
P. O. Box 6
Upper Sandusky, OH 43351-0006

IN THE COURT OF APPEALS OF THE THIRD
APPELLATE JUDICIAL DISTRICT OF OHIO

WYANDOT COUNTY

IN THE MATTER OF THE ESTATE OF:

CASE NO: 16-91-26

PHILLIP H. GOTTFRIED, DECEASED:

JOURNAL
ENTRY

(MARY ANN VOGEL, APPELLANT)

==========

For the reasons stated in the opinion of this Court rendered herein on May 28, 1992, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the Court of Common Pleas of Wyandot County, Probate division, is affirmed at the costs of the appellant for which judgment is rendered.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Judges Ronald E. Hadley , John R. Evans and Stephen R. Shaw - /s/

DATED: May 28, 1992.

PER CURIAM. This is an appeal from a judgment entered in the Court of Common Pleas of Wyandot County, Probate Division, in which the Court overruled the exceptions raised by the plaintiff-appellant, Mary Ann Vogel, and approved the third and final account filed by the administrator, defendant-appellee, Mark J. Ellis.

Phillip H. Gottfried died on January 21, 1985 and on July 5, 1985, the Court appointed the decendent's two sisters, Ms. Vogel and Kathlyn A. Thiel as co-administratrices of the estate, reserving the right to remove one or both parties in the event that animosity between the two hindered the efficient administration of the estate.

On July 15, 1987, following a hearing, the probate court removed both Ms. Vogel and Ms. Thiel as co-administratrices of the decedent's estate and appointed Mr. Ellis, who was also acting as the attorney for the estate, as the successor administrator.

On January 31, 1989, Mr. Ellis filed the first of three partial accountings for the decedent's estate and Ms. Vogel subsequently filed exceptions thereto. On December 21, 1990, following a hearing on the exceptions, the Court ordered an amended and corrected partial accounting, which was filed by Mr. Ellis and approved by the Court on that same date.

Mr. Ellis filed his second partial accounting on January 8, 1991, which was appoved by the probate court on April 10, 1991. Mr. Ellis filed a motion for allowance of attorney fees on January 8, 1991 and following a hearing on said motion on January 31 and February 6, 1991, the probate court entered judgment on February 13, 1991, granting Mr. Ellis' motion for attorney fees.

On May 21, 1991, Mr. Ellis filed his third and final fiduciary accounting and once again, Ms. Vogel filed exceptions to the accounting.

Following a hearing on July 26, 1991, the probate court overruled Ms. Vogel's exceptions and approved Mr. Ellis' third and final account in a judgment entry dated August 5, 1991.

It is from the August 5, 1991 judgment approving Mr. Ellis' third accounting that Ms. Vogel now appeals and asserts the following three assignments of error:

> I. The trial court erred in approving excessive attorney and fiduciary fees for administrator, Mary Ellis, and in also granting dual compensation to attorney, Mark Ellis.
>
> II. The trial court erred in approving the inventory and accounting and in overruling the appellant's exceptions to the subject accounting.
>
> III. The trial court erred in discharging the appellant, Mary Ann Vogel, as administrator and in unreasonably restricting the attorney fees and administrator's fees to the appellant, Mary Ann Vogel.

In its judgment entry approving the third and final accounting, the probate court thoroughly addressed the arguments raised by appellant's three assignments of error. Accordingly, upon the reasoning and authority set forth in the probate court's "Judgment entry approving third and final account" filed August 5, 1991 in that court and attached hereto as Exhibit A, we overrule the appellant's three assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

HADLEY, P.J., EVANS and SHAW , JJ., concur.

90-029 ACE

THE SUPREME COURT OF OHIO

1992 TERM

To wit: October 21, 1992

In re the Estate of Phillip H. Gottfried, Deceased	:	Case NO. 92-1468
	:	ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Wyandot County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Mary Ann Vogel.

(Court of Appeals No. 169126)

Thomas J. Moyer /s/
THOMAS J. MOYER
Chief Justice

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2113.35:

Executors and administrators shall be allowed commissions upon the amount of all the personal estate, including the income from the personal estate, that is received and accounted for by them and upon the proceeds of real estate that is sold as follows:

(A) For the first one hundred thousand dollars, at the rate of four per cent;

(B) All above one hundred thousand dollars and not exceeding four hundred thousand dollars, at the rate of three per cent;

(C) All above four hundred thousand dollars, at the rate of two per cent.

Executors and administrators also shall be allowed a commission of one per cent on the value of real estate that is not sold. Executors and administrators also shall be allowed a commission of one per cent on all property that is not subject to administration and that is includable for purposes of computing the Ohio estate tax, except joint and survivorship property.

The basis of valuation for the allowance of such commissions on real estate sold shall be the gross proceeds of sale, and for all other property the fair market value of the other property as of the date of death of the decedent. The commissions allowed to executors and administrators in this section shall be received in full compensation for all their ordinary services.

If the probate court finds, after hearing, that an executor or administrator, in any respect, has not faithfully discharged his duties as executor or administrator, the court may deny the executor or administrator any compensation whatsoever or may allow the executor or administrator the reduced compensation that the court thinks proper.

Ohio Revised Code Section 2113.36:

Allowances, in addition to those provided by section 2113.35 of the Revised Code for an executor or administrator, which the probate court considers just and reasonable shall be made for actual and necessary expenses and for extraordinary services not required of an executor or administrator in the common course of his duty.

Upon the application of an executor or administrator for futher allowances for extraordinary services rendered, the court shall review both ordinary and extraordinary services claimed to have been rendered. If the commissions payable pursuant to section 2113.35 of the Revised Code, exceed the reasonable value of such ordinary services rendered, the court must adjust any allowance made for extraordinary services so that total commissions and allowances to be made fairly reflect the reasonable value of both ordinary and extraordinary services.

When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or adminstrator shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees and, on application of the executor or administrator or the the attorney, shall fix the amount thereof. When provision is made by the will of the deceased for compensation to an executor, the amount provided shall be a full satisfaction for his services, in lieu of such commissions or his share thereof, unless by an instrument filed in the court within four months after his appointment he renounces all claim to the compensation given by the will.